Nautilus Tug & Towage Sdn Bhd v Dato' Seri Suresh Emmanuel Abishegam & Ors (Dato' Wan Mohamed Yaacob bin Dato' Wan Sailadin, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-151–03 OF 2023
ATAN MUSTAFFA J
13 FEBRUARY 2025

Civil Procedure — Stay of proceedings — Application for stay proceedings in statutory derivative action — Application for stay of proceedings pending oppression action — Whether there were special circumstances warranting a stay of proceedings — Whether the oppression action would provide a more comprehensive resolution of the disputes between the shareholders when trial of the derivative action had been ongoing with substantial evidence already adduced — Whether the arbitration proceedings preclude the oppression action as a forum for buyout relief — Whether the advanced stage of trial precluded a stay of proceedings — Whether the present action and oppression action can proceed concurrently — Whether distinct causes of action and different parties precluded a stay of proceedings — Companies Act 2016 ss 346 & 348

Nautilus Tug & Towage Sdn Bhd ('NTT') was a special purpose joint venture company with two shareholders: Azimuth Marine Sdn Bhd ('AMSB') with 80% of shares and Nautical Supreme Sdn Bhd ('NSSB') with 20% of shares. NTT's sole business was to undertake the Harbour Tugs Services Agreement dated 11 April 2013 with Vale Malaysia Minerals Sdn Bhd ('Vale') for a period of 15 years, of which approximately 4.5 years remain. On 27 April 2016, a director of NTT, filed an application for an inspection order to examine NTT's accounts due to queries regarding the company's financial records. This was granted by the High Court. On 19 October 2016, NSSB commenced arbitration proceedings against AMSB and NTT pursuant to the arbitration clause in the shareholders' agreement between NSSB and AMSB dated 15 March 2013 ('shareholders' agreement'). The arbitration was premised on, among other things, the transfer of 100,000 ordinary shares in NTT by AMSB to the fifth defendant on 16 December 2015. NSSB contended that this transfer breached the pre-emption clause in the shareholders' agreement, which led to NSSB's termination of the agreement. In the arbitration, AMSB counterclaimed sought a declaration to purchase NSSB's shares at a price to be determined by NTT's auditor. On 7 August 2018, DST filed an application in the Kuala Lumpur High Court sought leave to commence a derivative action on behalf of NTT. After initial refusal by the High Court, leave was granted by the Court of Appeal which was subsequently upheld by the Federal Court on

3 March 2023. Following the grant of leave, the present derivative action was commenced. Trial began on 18 June 2024 and as at the date of the hearing of this application has proceeded for nine days, with DST undergoing cross-examination. A further nine days of trial have been fixed. On 30 October 2024, AMSB filed an originating summons ('oppression action'). On 13 November 2024, the High Court ordered that this oppression action be converted into a writ action. On 6 November 2024, AMSB filed an application ('encl 276') sought to stay the derivative action pending the final determination of the oppression action. The issues in this application were: (a) whether there were special circumstances warranting a stay of proceedings; (b) whether the oppression action would provide a more comprehensive resolution of the disputes between the shareholders when trial of the derivative action had been ongoing with substantial evidence already adduced; (c) whether the arbitration proceedings precluded the oppression action as a forum for buyout relief; (d) whether the advanced stage of trial precluded a stay of proceedings; (e) whether the present action and oppression action can proceed concurrently; (f) whether distinct causes of action and different parties precluded a stay of proceedings.

Held, dismissing encl 276 with costs:

(1) The court was of the view that NTT sought distinctly corporate relief for wrongs done to the company — overpayment of shareholders' interest amounting to RM11,815,625.64 to AMSB and RM1,495,067 to NSSB, rectification of NTT's audited accounts for financial years 2013–2018, and remedies for breaches of directors' statutory and fiduciary duties by the first to fifth defendants and employee's contractual and equitable duties by the sixth defendant. These were fundamentally different from the personal shareholder remedies sought in the oppression action which concern alleged oppressive conduct against AMSB as a shareholder. Additionally, trial has substantially progressed with nine days completed, six years of proceedings undertaken, and significant preparation involving 50 volumes of documents and 13 witness statements. Staying proceedings at this advanced stage would waste judicial resources and cause undue prejudice. This prejudice was particularly acute for NSSB which had admitted liability for RM4,798,882.52 and stood ready to pay excess shareholders' interest, on which interest continued to accrue. The first to sixth defendants were also not parties to the oppression action. Even adverse findings in that action could not bind them. This created a real risk of inconsistent findings if issues concerning directors' duties were re-litigated in different forums. For these reasons, AMSB had failed to demonstrate special circumstances warranting a stay (see paras 26–29).

(2) The evidence showed that AMSB filed a counterclaim in the arbitration on 24 April 2017 seeking a declaration that it was entitled to purchase NSSB's shares in NTT at a price to be determined by NTT's auditor.

AMSB's recent filing of an application to restrain the arbitration proceedings appears to be a tactical manoeuvre to circumvent its own earlier election of forum. AMSB could not now be permitted to disavow its election and stay these proceedings to pursue identical buyout relief through the oppression action. To allow this would sanction forum shopping and potentially lead to inconsistent decisions on the same issue between parties (see paras 32–34).

(3) The court was of the view that the advanced stage of these proceedings weighed heavily against granting a stay. The trial had progressed through nine days, with a further nine days fixed. Over this six-year period, parties had invested substantial resources in preparing 50 volumes of documents and 13 witness statements. Furthermore, the oppression action was only filed on 30 October 2024 and was recently converted into a writ action. The circumstances here, where trial was well advanced and the alternative forum was at a nascent stage, militated strongly against granting a stay (see paras 37 & 39–40).

(4) The present action dealt precisely with such corporate wrongs which must be determined independently of any personal shareholder remedies sought in the oppression action (see para 46).

(5) The court emphasised that allowing corporate claims to be pursued via oppression remedy would 'effectively denude the statutory derivative action of much of its intended effect'. AMSB's argument that claims against nominee directors and the sixth defendant would 'resolve themselves' through buyout was particularly problematic. The first to sixth defendants are not parties to the oppression action. As noted in *HLC v PTL* [2022] MLJU 1370, following *Re Thien Kon Thai* [2008] 6 MLJ 278, no order may be made against a non-party. Any findings in the oppression action could not bind these defendants or resolve the serious allegations of breach of duties made against them (see paras 50–51).

[Bahasa Malaysia summary

Nautilus Tug & Towage Sdn Bhd ('NTT') ialah sebuah syarikat usaha sama tujuan khas dengan dua pemegang saham: Azimuth Marine Sdn Bhd ('AMSB') dengan 80% saham dan Nautical Supreme Sdn Bhd ('NSSB') dengan 20% saham. Perniagaan tunggal NTT adalah untuk melaksanakan Perjanjian Perkhidmatan Kapal Tunda Pelabuhan bertarikh 11 April 2013 dengan Vale Malaysia Minerals Sdn Bhd ('Vale') bagi tempoh 15 tahun, yang mana lebih kurang 4.5 tahun masih berbaki. Pada 27 April 2016, seorang pengarah NTT telah memfailkan permohonan bagi suatu perintah pemeriksaan untuk memeriksa akaun NTT disebabkan inkuiri mengenai rekod kewangan syarikat. Permohonan ini telah dibenarkan oleh Mahkamah Tinggi. Pada 19 Oktober 2016, NSSB telah memulakan prosiding timbang tara terhadap

AMSB dan NTT menurut klausa timbang tara dalam perjanjian pemegang saham antara NSSB dan AMSB bertarikh 15 Mac 2013 ('perjanjian pemegang saham'). Timbang tara tersebut adalah berasaskan, antara lain, pemindahan 100,000 saham biasa dalam NTT oleh AMSB kepada defendan kelima pada 16 Disember 2015. NSSB berhujah bahawa pemindahan tersebut telah melanggar Klausa Pra-Pilihan dalam Perjanjian Pemegang Saham, yang membawa kepada penamatan perjanjian tersebut oleh NSSB. Dalam prosiding timbang tara tersebut, AMSB telah membuat tuntutan balas memohon suatu pengisytiharan untuk membeli saham NSSB pada harga yang akan ditentukan oleh juruaudit NTT. Pada 7 Ogos 2018, DST telah memfailkan permohonan di Mahkamah Tinggi Kuala Lumpur untuk mendapatkan kebenaran memulakan tindakan derivatif bagi pihak NTT. Selepas penolakan awal oleh Mahkamah Tinggi, kebenaran telah diberikan oleh Mahkamah Rayuan yang kemudiannya dikekalkan oleh Mahkamah Persekutuan pada 3 Mac 2023. Susulan pemberian kebenaran tersebut, tindakan derivatif ini telah dimulakan. Perbicaraan bermula pada 18 Jun 2024 dan sehingga tarikh pendengaran permohonan ini telah berlangsung selama sembilan hari, dengan DST sedang menjalani pemeriksaan balas. Sembilan hari perbicaraan tambahan telah ditetapkan. Pada 30 Oktober 2024, AMSB telah memfailkan satu saman pemula ('tindakan penindasan'). Pada 13 November 2024, Mahkamah Tinggi memerintahkan supaya tindakan penindasan ini ditukar kepada tindakan writ. Pada 6 November 2024, AMSB memfailkan permohonan ('lampiran 276') untuk menangguhkan tindakan derivatif ini sehingga keputusan muktamad tindakan penindasan tersebut. Isu-isu dalam permohonan ini adalah: (a) sama ada terdapat keadaan khas yang membolehkan penangguhan prosiding; (b) sama ada tindakan penindasan akan menyediakan penyelesaian yang lebih menyeluruh terhadap pertikaian antara pemegang saham apabila perbicaraan tindakan derivatif telah berjalan dengan keterangan substantif telah dikemukakan; (c) sama ada prosiding timbang tara menghalang tindakan penindasan daripada menjadi forum bagi relif pembelian balik saham (*buyout relief*); (d) sama ada tahap perbicaraan yang sudah lanjut menghalang penangguhan prosiding; (e) sama ada tindakan semasa dan tindakan penindasan boleh berjalan serentak; (f) sama ada kausa tindakan yang berbeza dan pihak-pihak yang berbeza menghalang penangguhan prosiding.

Diputuskan, mengenepikan lampiran 276 dengan kos:

(1) Mahkamah berpendapat bahawa NTT menuntut relif korporat yang khusus bagi salah laku terhadap syarikat iaitu bayaran lebihan faedah pemegang saham berjumlah RM11,815,625.64 kepada AMSB dan RM1,495,067 kepada NSSB, pembetulan akaun teraudit NTT bagi tahun kewangan 2013–2018, serta relif bagi pelanggaran kewajipan statutori dan fidusiari pengarah oleh defendan pertama hingga kelima dan kewajipan kontrak serta ekuiti pekerja oleh defendan keenam. Relif ini adalah secara asasnya berbeza daripada relif peribadi pemegang saham

yang dituntut dalam tindakan penindasan yang melibatkan dakwaan tindakan menindas terhadap AMSB sebagai pemegang saham. Tambahan pula, perbicaraan telah berlangsung pada tahap yang sangat lanjut dengan sembilan hari, enam tahun prosiding berjalan, dan persediaan besar melibatkan 50 jilid dokumen serta 13 pernyataan saksi. Menangguhkan prosiding pada tahap ini akan membazirkan sumber kehakiman dan menyebabkan prejudis yang tidak wajar. Prejudis ini lebih ketara terhadap NSSB yang telah mengakui liabiliti sebanyak RM4,798,882.52 dan bersedia membayar lebihan faedah pemegang saham, yang mana faedah terus berjalan ke atas jumlah tersebut. Defendan pertama hingga keenam juga bukanlah pihak dalam tindakan penindasan. Malah, dapatan yang tidak memihak kepada mereka dalam tindakan tersebut tidak akan mengikat mereka. Ini mewujudkan risiko sebenar berlakunya dapatan yang bercanggah sekiranya isu-isu mengenai kewajipan pengarah dibicarakan semula di forum berbeza. Atas sebab-sebab ini, AMSB telah gagal menunjukkan keadaan khas yang membolehkan prosiding ditangguhkan (lihat perenggan 26–29).

(2) Keterangan menunjukkan bahawa AMSB telah memfailkan tuntutan balas dalam timbang tara pada 24 April 2017 untuk mendapatkan suatu pengisytiharan bahawa mereka berhak membeli saham NSSB dalam NTT pada harga yang akan ditentukan oleh juruaudit NTT. Permohonan terkini AMSB untuk menghalang prosiding timbang tara kelihatan sebagai satu langkah taktikal untuk mengelakkan pilihan forum yang telah dibuatnya sendiri sebelum ini. AMSB tidak boleh kini dinafikan pilihan tersebut dan menangguhkan prosiding ini untuk mendapatkan relif pembelian balik saham yang sama melalui tindakan penindasan. Jika dibenarkan, ini akan menggalakkan forum shopping dan berpotensi membawa kepada keputusan yang bercanggah mengenai isu yang sama antara pihak-pihak (lihat perenggan 32–34).

(3) Mahkamah berpendapat bahawa tahap prosiding yang sudah lanjut ini sangat mempengaruhi penolakan permohonan penangguhan. Perbicaraan telah berlangsung selama sembilan hari dan sembilan hari lagi telah ditetapkan. Sepanjang tempoh enam tahun ini, pihak-pihak telah melaburkan sumber yang besar dengan menyediakan 50 jilid dokumen dan 13 pernyataan saksi. Tambahan pula, tindakan penindasan hanya difailkan pada 30 Oktober 2024 dan baru-baru ini ditukar kepada tindakan writ. Keadaan ini, di mana perbicaraan semasa berada pada tahap yang lanjut manakala forum alternatif masih di peringkat awal, jelas menyokong penolakan permohonan penangguhan (lihat perenggan 37 & 39–40).

(4) Tindakan ini menangani secara khusus salah laku korporat sedemikian yang mesti diputuskan secara berasingan daripada apa-apa relif peribadi

pemegang saham yang dituntut dalam tindakan penindasan (lihat perenggan 46).

(5) Mahkamah menegaskan bahawa membenarkan tuntutan korporat dibawa melalui relif penindasan akan 'secara efektif melucutkan tindakan derivatif statutori daripada tujuan asalnya'. Hujahan AMSB bahawa tuntutan terhadap pengarah penama dan defendan keenam akan 'selesai dengan sendirinya' melalui pembelian balik saham adalah sangat bermasalah. Defendan pertama hingga keenam bukan pihak dalam tindakan penindasan. Seperti dinyatakan dalam *HLC v PTL* [2022] MLJU 1370, yang mengikuti *Re Thien Kon Thai* [2008] 6 MLJ 278, tiada perintah boleh dibuat terhadap pihak yang bukan pihak prosiding. Apa-apa dapatan dalam tindakan penindasan tidak boleh mengikat defendan-defendan tersebut atau menyelesaikan dakwaan serius pelanggaran kewajipan yang dibuat terhadap mereka (lihat perenggan 50–51).]

Cases referred to

AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921, CA (refd)

All Kurma Sdn Bhd v Teo Heng Tatt & Ors [2024] MLJU 1811, HC (refd)

Choy Yuk Kong & Ors v Landyork Farming Sdn Bhd & Ors (claiming on behalf of themselves and as representatives for the interests of Sykt Landyork Farming Sdn Bhd) [2020] 10 MLJ 806, HC (refd)

Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board [2004] OJ No 191 (refd)

HLC v PTL [2022] MLJU 1370, HC (refd)

International Construction & Civil Engineering Sdn Bhd v Jittra Sdn Bhd & Ors [2018] MLJU 1207; [2018] 1 LNS 1252, CA (refd)

Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal [2014] 3 MLJ 10, FC (refd)

Ling Peek Hoe & Anor v Golden Star & Ors [2020] 6 MLJ 689, CA (refd)

Low Cheng Teik & Ors v Low Ean Nee [2024] 5 MLJ 580; [2024] 6 MLRA 220, FC (refd)

Orange Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd and another suit [2019] MLJU 447, CA (refd)

PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2019] 4 MLJ 421, FC (refd)

Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors [2018] 1 MLJ 141, FC (refd)

Thien Kon Thai, Re [2008] 6 MLJ 278, CA (refd)

Wain v Drapac (No 2) [2013] VSC 381, SC (refd)

Legislation referred to

Companies Act 2016 s 346

Lim Chee Wee (with Jasper Tan, Wee Hee, Aaron Mah and Lim Xin Wei (pupil in chambers)) (Lim Chee Wee Partnership) for the plaintiff.

David Mathews (with Joyce Pang and Koh Jo Vin) (Joyce Pang) for the eighth defendant.

Jack Yow (with Lee Ji Kean) (Rahmat Lim & Partners) for the seventh defendant and third party.

Atan Mustaffa J:

[1] Before the court is an application to stay proceedings in a statutory derivative action pending the determination of a separate oppression action commenced against the company and its minority shareholder, where both actions arise from an acrimonious shareholder dispute in a joint venture company. The key issues are whether there exist special circumstances warranting a stay of proceedings, and whether the oppression action would provide a more comprehensive resolution of the disputes between the shareholders, having regard to the fact that trial of the derivative action has been ongoing for nine days with substantial evidence already adduced.

BACKGROUND FACTS

[2] This matter concerns Nautilus Tug & Towage Sdn Bhd ('NTT'), a special purpose joint venture company with two shareholders: Azimuth Marine Sdn Bhd ('AMSB') holding 80% of shares and Nautical Supreme Sdn Bhd ('NSSB') holding 20% of shares. NTT's sole business is to undertake the Harbour Tugs services agreement dated 11 April 2013 with Vale Malaysia Minerals Sdn Bhd ('Vale') for a period of 15 years, of which approximately four and a half years remain.

[3] On 27 April 2016, Dato' Seri Timor Shah Rafiq ('DST'), a director of NTT, filed an application for an inspection order to examine NTT's accounts due to queries regarding the company's financial records. This was granted by the High Court.

[4] On 19 October 2016, NSSB commenced arbitration proceedings against AMSB and NTT pursuant to the arbitration clause in the shareholders' agreement between NSSB and AMSB dated 15 March 2013 ('shareholders' agreement'). The arbitration was premised on, among other things, the transfer of 100,000 ordinary shares in NTT by AMSB to the fifth defendant, Jaya Sudhir, on 16 December 2015. NSSB contended that this transfer breached the pre-emption clause in the shareholders' agreement, which led to NSSB's

termination of the agreement. In the arbitration, AMSB counterclaimed seeking a declaration to purchase NSSB's shares at a price to be determined by NTT's auditor.

[5] On 7 August 2018, DST filed an application in the Kuala Lumpur High Court (WA-24NCC-392–08 of 2018) seeking leave to commence a derivative action on behalf of NTT. After initial refusal by the High Court, leave was granted by the Court of Appeal on 21 September 2021, which was subsequently upheld by the Federal Court on 3 March 2023.

[6] Following the grant of leave, the present derivative action was commenced. Trial began on 18 June 2024 and as at the date of the hearing of this application has proceeded for nine days, with DST undergoing cross-examination. A further nine days of trial have been fixed.

[7] On 30 October 2024, AMSB filed an originating summons (WA-24NCC-519–10 of 2024) ('oppression action') naming NTT, NSSB, DST, and Dato' Wan Mohamed Yaacob bin Dato' Wan Salaidin ('Dato' Wan') as defendants. On 13 November 2024, the High Court ordered that this oppression action be converted into a writ action.

[8] On 6 November 2024, AMSB filed an application (encl 276) seeking to stay the derivative action pending the final determination of the oppression action. Subsequently, on 27 November 2024, AMSB filed an originating summons seeking to restrain NSSB and NTT from proceeding with the arbitration proceedings.

[9] The arbitration proceedings have been restrained by an ad interim injunction obtained by the fifth defendant in a separate action, pending his application for leave to appeal to the Federal Court.

[10] Over the past eight years, multiple legal proceedings have taken place between the parties. These include the wrongful transfer suits (WA-22NCC-113–03 of 2018), where the High Court granted a mandatory injunction requiring Jaya Sudhir to transfer 100,000 shares back to AMSB. This decision was upheld by the Court of Appeal on 25 September 2024, and Jaya Sudhir filed a motion for leave to appeal to the Federal Court on 24 October 2024.

[11] Two other derivative actions were also initiated: the management fee leave application (WA-24NCC-629–11 of 2023), where leave was granted on 23 May 2024, and the OPEX leave application (WA-24NCC-677–12 of 2023), where ASM's application to intervene was dismissed on 7 November 2024.

[12] The present proceedings have generated substantial documentation, including 50 volumes of bundles of documents, 13 witness statements, and various pre-trial documents. As at the date of hearing of this application, the most recent trial date was on 18 November 2024, marking the ninth day of trial, with a further nine days scheduled for 2 December 2024 to 6 December 2024.

ENCLOSURE 276

[13] AMSB filed encl 276 on 6 November 2024, seeking an order that further proceedings in this action be stayed pending the final determination of the oppression action. The application was made pursuant to the inherent jurisdiction of the court. AMSB also sought costs in the cause and such further or other relief as the court deems fit and proper.

[14] The grounds for the application, as set out in AMSB's affidavit in support, were that:

(a) the oppression action seeks a complete resolution of all disputes, past, present and future, between the parties through a buyout order at fair value to be determined by the court;

(b) any valuation ordered by the court can take into account complaints that may affect valuation, with no prejudice to NSSB if a buyout order is made;

(c) a stay would avoid multiplicity of actions relating to shareholders' disputes within NTT; and

(d) the court's judicial resources would be preserved from further litigation of disputes between NTT's shareholders pending final determination of the oppression action. AMSB contended that these constituted special circumstances warranting a stay.

RESPECTIVE PARTIES' POSITIONS

[15] AMSB argues that a stay of proceedings should be granted pending determination of the oppression action because there are special circumstances — namely that NTT is a special purpose joint venture company with only two shareholders who have been embroiled in eight years of costly litigation stemming from deep-seated mutual distrust, and the oppression action would provide a comprehensive solution through determining a fair buyout price that can take into account all issues and complaints while avoiding multiplicity of proceedings.

[16] NTT opposes the stay application on the grounds that AMSB has not met the 'very high' threshold required for staying trial proceedings, AMSB is abusing the process by pursuing identical buyout relief in multiple forums (arbitration and oppression action), the derivative action and oppression action can properly proceed concurrently as they seek different reliefs, the trial has already substantially progressed with nine days completed, and there would be prejudice from delay since the derivative action has been ongoing for six years.

[17] NSSB and the third party, Dato' Wan, oppose the stay application because AMSB has failed to demonstrate any special circumstances or necessity to prevent injustice, the present derivative action involves distinct causes of action and reliefs compared to the oppression action, staying proceedings would actually lead to multiplicity since the trial is well advanced, and delay would prejudice NSSB (who admits liability for certain amounts and wants to pay) and Dato' Wan (who wants to clear his name) while interest continues to accrue.

ANALYSIS AND FINDINGS OF THE COURT

Whether there are special circumstances warranting a stay of proceedings

[18] AMSB contends that special circumstances exist to warrant a stay of the present proceedings pending determination of the oppression action. These special circumstances include:

(a) NTT being a special purpose joint venture company with only two shareholders undertaking a single business with four and a half years remaining;

(b) the existence of prolonged and multiple litigation spanning eight years stemming from deep-seated mutual distrust between shareholders; and

(c) the oppression action providing a more comprehensive solution through determination of fair buyout price taking into account all issues and complaints. AMSB relies on *AB (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 921, which was cited with approval by the Federal Court in *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421 and the Court of Appeal in *Ling Peek Hoe & Anor v Golden Star & Ors* [2020] 6 MLJ 689.

[19] NTT, NSSB and Dato' Wan oppose the stay application on grounds that:

(a) the threshold for staying trial proceedings is 'very high' per the Court of Appeal in *International Construction & Civil Engineering Sdn Bhd v Jittra Sdn Bhd & Ors* [2018] MLJU 1207; [2018] 1 LNS 1252;

(b) AMSB is improperly pursuing identical buyout relief in multiple forums including arbitration;

(c) the derivative action and oppression action can proceed concurrently as held in *Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board* [2004] OJ No 191;

(d) trial has substantially progressed with nine days completed and significant preparation undertaken; and

(e) delay would prejudice the parties.

[20] I find that no special circumstances exist warranting a stay. The Court of Appeal in *International Construction* established that the threshold for staying trial proceedings is 'very high' as trial courts must dispose of cases expeditiously. Hamid Sultan JCA stated:

> [14] ... (a) The threshold to satisfy an application for stay of proceedings is in contrast to stay of execution in this time and era is very high as the trial court is required to dispose of the cases within a specific time, expeditiously and fairly ...
>
> [15] ... The strict rule in vogue is that once an action is filed, it must proceed expeditiously. The threshold to seek a stay of proceedings is very high in cases before the trial court. Very importantly, if the bona fide of the application is in doubt, a stay application must be dismissed in limine.

[21] AMSB's reliance on *AB (Sudan)* and the *Najib* case is misplaced as those cases dealt with criminal matters and judicial review, not oppression/derivative actions. The present circumstances, while complex, do not meet this high threshold.

[22] More importantly, AMSB is improperly pursuing identical buyout relief in multiple forums. AMSB elected arbitration as its forum by filing a counterclaim seeking buyout in 2016. Having made that election, it cannot now seek to stay these proceedings to pursue the same relief through an oppression action.

[23] The derivative action and oppression action serve distinct purposes and can proceed concurrently. The Federal Court in *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLJ 141 explained this fundamental distinction at para 34:

> a minority oppression petition deals with action by the minority shareholder of a company against the majority controllers where the company cannot be the petitioner and is only a nominal defendant ... by contrast a derivative action is brought by a minority shareholder for and on behalf of the company to deal with

wrongs done to the company and for the benefit of the company eg to recover for the company assets which may have been unlawfully siphoned off from the company.

[24] As held by Cumming J in the Ontario Supreme Court in *Ford Motor Co* of Canada:

> The presence of a derivative action remedy does not preclude minority shareholders from pursuing their personal remedy under s 241. The two are not mutually exclusive.

[25] This principle was recently affirmed by Nallini Pathmanathan FCJ in *Low Cheng Teik & Ors v Low Ean Nee* [2024] 5 MLJ 580; [2024] 6 MLRA 220 where Her Ladyship held that:

> the central distinction between the oppression action and the derivative action lies in the nature of the claim. An oppression claim premised on the circumstances set out in s 346(1) is a personal claim made by the minority shareholder who suffers a distinct and personal loss, while a derivative action is brought on behalf of the company by the shareholder in a representative capacity.

[26] In the present case, NTT seeks distinctly corporate relief for wrongs done to the company — overpayment of shareholders' interest amounting to RM11,815,625.64 to AMSB and RM1,495,067 to NSSB, rectification of NTT's audited accounts for financial years 2013–2018, and remedies for breaches of directors' statutory and fiduciary duties by the first to fifth defendants and employee's contractual and equitable duties by the sixth defendant. These are fundamentally different from the personal shareholder remedies sought in the oppression action which concern alleged oppressive conduct against AMSB as a shareholder.

[27] Additionally, trial has substantially progressed with nine days completed, six years of proceedings undertaken, and significant preparation involving 50 volumes of documents and 13 witness statements. Staying proceedings at this advanced stage would waste judicial resources and cause undue prejudice. This prejudice is particularly acute for NSSB which has admitted liability for RM4,798,882.52 and stands ready to pay excess shareholders' interest, on which interest continues to accrue.

[28] The first to sixth defendants are also not parties to the oppression action. Even adverse findings in that action cannot bind them. This creates a real risk of inconsistent findings if issues concerning directors' duties are re-litigated in different forums.

[29] For these reasons, I find that AMSB has failed to demonstrate special circumstances warranting a stay.

Whether the arbitration proceedings preclude the oppression action as a forum for buyout relief

[30] AMSB contends that the arbitration is non-comprehensive as it relates only to alleged breaches of pre-emption rights under the shareholders' agreement and does not include post-reference complaints. AMSB argues that the arbitral tribunal lacks jurisdiction over post-reference disputes and that after termination of the shareholders' agreement, post-reference disputes between shareholders cannot be determined in the arbitration. AMSB has filed a separate application to restrain NSSB and NTT from proceeding with the arbitration.

[31] NTT, NSSB and Dato' Wan submit that AMSB is improperly pursuing identical buyout relief in multiple forums, having elected arbitration as its chosen forum through its counterclaim in 2016. They argue that AMSB's conduct amounts to forum shopping and an abuse of process.

[32] I find AMSB's arguments unpersuasive. The evidence shows that AMSB filed a counterclaim in the arbitration on 24 April 2017 seeking a declaration that it was entitled to purchase NSSB's shares in NTT at a price to be determined by NTT's auditor. This constituted a clear election of the arbitral forum for pursuing buyout relief. As noted in NSSB's notice of arbitration dated 19 October 2016 and AMSB's defence and counterclaim dated 24 April 2017, both parties expressly contemplated the arbitral tribunal determining buyout relief.

[33] AMSB's argument regarding the arbitral tribunal's lack of jurisdiction over post-reference disputes rings hollow when AMSB itself has elected to pursue buyout relief through its counterclaim in that very forum. The arbitration remains alive, albeit currently restrained by an ad interim injunction obtained by the fifth defendant pending leave to appeal to the Federal Court. AMSB's recent filing of an application to restrain the arbitration proceedings appears to be a tactical manoeuvre to circumvent its own earlier election of forum.

[34] AMSB cannot now be permitted to disavow its election and stay these proceedings to pursue identical buyout relief through the oppression action. To allow this would sanction forum shopping and potentially lead to inconsistent decisions on the same issue between parties. This principle was emphasised by Harminder Singh Dhaliwal JCA (as he then was) in *Orange Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd and another suit* [2019]

MLJU 447 where His Lordship noted that conflicting decisions on the same issue not only brings embarrassment to the court but may also undermine public confidence in the administration of justice. His Lordship stated:

> [17] The objection to multiplicity of proceedings is well-grounded and underscored by the public interest to avoid conflicting decisions by two different courts on the same issue between parties ... Conflicting decisions on the same issue not only brings embarrassment to the court or tribunal but may also undermine public confidence in the administration of justice.
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> ...
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> [19] In the circumstances we agreed that having the claim and counterclaim decided in different tribunals would be an abuse of the process of the court as that would countenance litigating the same issues before different courts.

Whether the advanced stage of trial precludes a stay of proceedings

[35] AMSB contends that despite trial having commenced, a stay should be granted as the evidence elicited thus far can be considered in the oppression action when assessing fair purchase price, and therefore the proceedings to date would not be in vain.

[36] NTT, NSSB and Dato' Wan submit that the trial has substantially progressed with nine days completed and significant preparation undertaken over six years of proceedings. They argue that staying proceedings at this advanced stage would waste judicial resources and cause undue prejudice, particularly given the extensive documentation comprising 50 volumes of documents and 13 witness statements, including experts' witness statements. They further highlight that DST has already endured nine days of cross-examination.

[37] I find AMSB's position untenable. The Court of Appeal in *International Construction* established that the threshold to stay proceedings is 'very high' as the trial court is required to dispose of cases expeditiously and fairly. The advanced stage of these proceedings weighs heavily against granting a stay. The trial commenced on 18 June 2024 and as at the date of the hearing of this application, has progressed through nine days, with a further nine days fixed. The proceedings themselves trace back to 7 August 2018 when DST first sought leave to commence the derivative action. Over this six-year period, parties have invested substantial resources in preparing 50 volumes of documents and 13 witness statements.

[38] AMSB's suggestion that evidence from these proceedings can simply be transported to the oppression action oversimplifies the distinct nature of these actions. The derivative action concerns corporate wrongs including alleged

A excess shareholders' interest payments of RM11,815,625.64 to AMSB and RM1,495,067 to NSSB, which require detailed examination through cross-examination. Indeed, DST has already endured nine days of cross-examination.

B **[39]** Furthermore, the oppression action was only filed on 30 October 2024 and was recently converted into a writ action. As noted by Kenneth St James JC (as he then was) in *All Kurma Sdn Bhd v Teo Heng Tatt & Ors* [2024] MLJU 1811, a stay of proceedings should be granted very sparingly and only in exceptional circumstances. His Lordship stated:

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> [28] ... In general. A stay of proceedings arises under an order of the court which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the
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> D trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process. The order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the
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> E exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.

[40] The circumstances here, where trial is well advanced and the alternative forum is at a nascent stage, militate strongly against granting a stay.

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Whether the present action and oppression action can proceed concurrently

[41] AMSB contends that allowing both actions to proceed concurrently would necessitate several suits proceeding in parallel, leading to unnecessary
G overlap and inevitable appeals. AMSB argues this would cause undue delay in concluding the oppression action, even though it intends to apply for summary judgment. AMSB further submits that continuing the joint venture relationship during parallel proceedings will likely spawn additional litigation
H due to the acrimonious relationship between shareholders.

[42] NTT, NSSB and Dato' Wan submit that the actions can proceed concurrently as they serve distinct purposes and seek different reliefs. They argue that accurate valuation of NTT's shares in any buyout order requires
I determination of the issues in the present action concerning shareholders' advances and excess interest payments. They further contend that the business continues to function externally with Vale remaining a client and Exim Bank continuing as lender.

[43] I find AMSB's concerns about parallel proceedings unpersuasive. The evidence demonstrates that NTT remains operationally functional despite internal disputes. I accept NTT's submissions that while the company internally may seem dysfunctional with a lot of strife as argued by AMSB, Externally, it is working as Vale is still a client and Exim Bank is still a lender to NTT. AMSB's suggestion that parallel proceedings would spawn additional litigation is speculative and appears to be a self-serving attempt to avoid determination of the serious allegations in the present action.

[44] AMSB's intention to apply for summary judgment in the oppression action does not advance its position. Even if summary judgment is obtained, assessment of fair purchase price would necessarily require determination of the very issues being litigated in the present action — namely the alleged excess shareholders' interest payments of RM11,815,625.64 to AMSB and RM1,495,067 to NSSB. Staying the present action would therefore not expedite resolution but rather delay final determination of these critical issues.

[45] Moreover, NSSB has already admitted liability for RM4,798,882.52 and stands ready to pay the excess shareholders' interest. Staying these proceedings would prejudice NSSB through continued accrual of interest while also preventing Dato' Wan from clearing his name regarding allegations of breach of directors' duties. The High Court in *Choy Yuk Kong & Ors v Landyork Farming Sdn Bhd & Ors (claiming on behalf of themselves and as representatives for the interests of Sykt Landyork Farming Sdn Bhd)* [2020] 10 MLJ 806 has clearly established that distinct corporate wrongs should be remedied by way of statutory derivative action. The court stated:

> [24] The Companies Act provides a separate and distinct remedy for corporate wrongs. Since the oppression provision under s 346 can be invoked without the leave of court, and if successfully invoked, can result in the grant of a much broader range of remedies than those available in a statutory derivative action under s 347, the undeniable concern is to ensure that plaintiffs do not improperly pursue an action for minority oppression when a remedy under a statutory derivative action is more apt.
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> [25] A distinct corporate wrong, therefore, should be remedied by way of a statutory derivative action, found in ss 347 and 348 of the Companies Act.

[46] The present action deals precisely with such corporate wrongs which must be determined independently of any personal shareholder remedies sought in the oppression action.

Whether distinct causes of action and different parties preclude a stay of proceedings

[47] AMSB contends that distinct causes of action and different parties are not a bar to granting a stay, as the issues concerning shareholders' advances and

A excess interest ultimately affect share valuation. AMSB argues that these matters can be addressed in determining fair purchase price in the oppression action, relying on *Wain v Drapac (No 2)* [2013] VSC 381. AMSB further submits that claims against nominee directors and the sixth defendant are ancillary issues that will resolve themselves once buyout occurs.

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[48] NTT, NSSB and Dato' Wan argue that the derivative action seeks corporate relief for wrongs done to NTT that cannot be adequately addressed in the oppression action. They emphasise that the first to sixth defendants are not parties to the oppression action, and that the claims involve breaches of C directors' duties and employee duties that are distinct from shareholder remedies.

[49] I find AMSB's position misconceives the fundamental distinction D between derivative and oppression actions. Nallini Pathmanathan FCJ in *Low Cheng Teik* held that 'in a shareholder's oppression action, the shareholder is required to suffer a harm or injury which is separate and distinct from that of the company'. Her Ladyship further emphasised that 'no reflective loss' principle dictates that 'directly recoverable damages do not include a reflective E loss suffered by a drop in the value of the plaintiff shareholder's shares'.

[50] The present action involves distinctly corporate wrongs seeking corporate remedies. These include alleged excess shareholders' interest payments of RM11,815,625.64 to AMSB and RM1,495,067 to NSSB, F rectification of NTT's audited accounts for financial years 2013–2018, and breaches of directors' statutory and fiduciary duties. As held by the High Court in *Choy Yuk Kong*, 'a distinct corporate wrong should be remedied by way of a statutory derivative action'. The court emphasised that allowing corporate claims to be pursued via oppression remedy would 'effectively denude the G statutory derivative action of much of its intended effect'.

[51] AMSB's argument that claims against nominee directors and the sixth defendant will 'resolve themselves' through buyout is particularly problematic. The first to sixth defendants are not parties to the oppression action. As noted H in *HLC v PTL* [2022] MLJU 1370, following *Re Thien Kon Thai* [2008] 6 MLJ 278, no order may be made against a non-party. Any findings in the oppression action cannot bind these defendants or resolve the serious allegations of breach of duties made against them.

I **[52]** AMSB's reliance on the broad powers under s 346 of the Companies Act 2016 overlooks that these powers are directed at shareholder remedies, not corporate wrongs. The Federal Court in *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10 found that allowing corporate claims to be pursued via oppression remedy would

effectively circumvent proper plaintiff rule and might result in the aggrieved shareholder recovering damages at the expense of other similarly affected shareholders.

CONCLUSION

[53] This court has carefully considered the submissions of all parties and the evidence before it. Having regard to the high threshold required for staying proceedings that are well advanced, the distinct nature of the reliefs sought in the derivative action compared to the oppression suit, and the substantial progress already made in the trial with nine days of hearing completed, I am not persuaded that special circumstances exist warranting a stay. Further, the court is mindful that any valuation exercise in the oppression action would benefit from findings made in the present action regarding the company's financial position and alleged breaches of duties. Accordingly, encl 276 is dismissed with costs.

Enclosure 276 dismissed with costs.

Reported by Muhammad Azham Marwan